BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHERRI L. SANGSTER, Claimant, v. POTLATCH CORPORATION, Employer, and WORKERS COMPENSATION EXCHANGE, Surety, Defendants.	)	**IC 01-008322** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed: November 16, 2004

BACKGROUND

Pursuant to Idaho Code § 72-506, the Commission originally assigned this matter to Referee Lora Rainey Breen who held a hearing on July 16, 2002. Issues addressed at that hearing were limited to compensability, medical and income benefits, and attorney fees. In an Order dated February 28, 2003, the Commission adopted the Referee's Findings, Conclusions, and Recommendation and ordered that Claimant had sustained a compensable industrial injury and was entitled to both medical and income benefits. In particular, medical expenses incurred as a result of treatment by Warren Ellison, M.D., N. Kirk White, M.D., SPORT Physical Therapy, and Gregory D. Dietrich, M.D., on and after February 9, 2001, together with diagnostic tests ordered by these providers were found to be compensable. Further, Claimant was entitled to temporary total disability (TTD) benefits from March 12, 2001 until October 16, 2001, and to temporary partial disability (TPD) benefits from October 16, 2001 through December 10, 2001. No attorney fees were

awarded. *Faith2003,* 2003 IIC 148, 157 (Feb. 28, 2003).

In October 2003, Defendants requested a second hearing on the issues of permanent partial impairment (PPI) and disability in excess of impairment (PPD). In her response to Defendants' request, Claimant asked that in addition to the issues identified by Defendants, the issues of TTD and TPD benefits, medical benefits and attorney fees be addressed.

The matter was reassigned to Referee Rinda Just, who conducted a second hearing in Lewiston, Idaho, on April 9, 2004. John R. Tait represented Claimant. Scott Chapman represented Defendants. The parties presented oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The case came under advisement on September 8, 2004 and is now ready for decision.

ISSUES

As modified and agreed upon by the parties at hearing, the issues to be resolved are:

1. Whether and to what extent Claimant is entitled to the following benefits:
   (a) permanent partial impairment (PPI);
   (b) disability in excess of impairment (PPD); and
   (c) medical care; and,

2. Whether Claimant is entitled to attorney fees.

CONTENTIONS OF THE PARTIES

Claimant contends she is entitled to an impairment rating higher than 5% and to disability in excess of impairment. She also claims that a portion of the medical bills remains outstanding. Finally, Claimant asserts entitlement to attorney fees for Defendants' unreasonable delay in payment of benefits necessitating a second hearing.

Defendants contend that Claimant is not entitled to an impairment rating in excess of the 5% rating given by Ivar Birkeland, Jr., M.D., and deny she is entitled to disability in excess of

impairment. Defendants contend that they have reimbursed Claimant's out-of-pocket medical expenses and have repaid Claimant's private health insurance carrier for all of its outlays related to Claimant's industrial accident and that Claimant is not entitled to any additional medical care. Finally, Defendants assert that Claimant is not entitled to attorney fees as regards the April 2004 hearing.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant and Sharon Vahlkamp of the Potlatch Corporation;

2. Claimant's Exhibits 1 – 34, including Supplements, admitted at hearing;

3. Defendant's Exhibits A – I, including Supplements, admitted at hearing;

4. Joint Exhibits 1 and 2 admitted at hearing;

5. Industrial Commission Legal File;

6. Pre-hearing deposition of Robert C. Colburn, M.D.; and,

7. Post-hearing deposition of Ivar Birkeland, Jr., M.D.

All objections made in the post-hearing depositions are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

PPI/PPD

1. The Commission has previously entered findings and conclusions in this case that are relevant to the determination of the case at bar. In addition to the conclusions of law discussed

previously, the Commission's decision included the following notable findings:

- At the time of her industrial injury, Claimant worked for Employer, a paper products mill. She worked primarily in the pulp and paper area that makes coated board for beverage cartons. Claimant held a "second helper" position, and on the date of injury she was working on a machine called the "72 Extruder" (Extruder). The Extruder took uncoated paperboard and coated it with plastic.

> Claimant described in detail her work activities at hearing [*see,* July 2002 Hearing Transcript, pp. 23-40]. Her descriptions are unrefuted and credible. The job was physical and fast-paced and Claimant would be on her feet and physically moving for most of her shift.

Faith2003, 2003 IIC 148, 149 (Feb. 28, 2003).

- Claimant was off work from March 12, 2001 until July 16, 2001 when she returned to light duty work. Claimant performed light duty work until December 10, 2001. *Id.,* p. 156.
- At the time of the first hearing on July 16, 2002, Claimant was working full-time for Employer in a less strenuous position. *Id.,* p. 153.

2. At the time of the April 9, 2004 hearing, Claimant was 46 years of age and living in Asotin, Washington.

3. Claimant was provided with a full work release on December 10, 2002. The release included no restrictions, and clearly stated, "Re check after one month of work." Claimant's Exhibit 11, p. 070021.

4. Shortly after her December 2001 return to work, the pulp and paper area curtailed production and Claimant worked in the consumer products division (CPD) where tissue products are made. Claimant testified that her CPD work entailed loading single rolls of toilet tissue into boxes, taping the boxes closed, and placing them on a pallet. The CPD had a 45-pound lifting limitation,

requiring two people to move or stack the boxes of tissue. Claimant testified that the pulp and paper area had no such lifting limitation "that I'm aware of." April 2004 Tr., p. 46.

5. In the pulp and paper area, the hierarchy of jobs from highest pay and least physically demanding to lowest pay and most physically demanding was: operator, first helper, winder operator, second helper, winder helper and utility person.

6. When pulp and paper production resumed following the curtailment, Claimant returned to full-time work in the extruder department. She did not, however, return to full time work as second helper. Claimant was immediately trained as a rewind operator, a position one step above her time of injury position. According to Claimant's unrefuted testimony,[1] in the year following her return to work in the extruder department, she worked only 20 ½ days in the second helper position. Those 20 ½ days were spread over a period of about six months, and Claimant worked "probably no more than two consecutive days" at any one time as a second helper. April 2004 Tr., p. 42.

7. Claimant also testified that on the days when she worked as second helper, she modified the way she performed the job—she avoided using her right leg, and asked for assistance in pushing rolls of extruded paper and in removing heavy "slabs" of waste paper.

8. On June 25, 2002, in the presence of Claimant, Dr. Ellison completed a form that set out permanent restrictions for Claimant as a result of her work injury. In particular, Dr. Ellison permitted Claimant to lift or carry up to 20 pounds continuously and 21 to 50 pounds occasionally. Claimant was prohibited from lifting or carrying in excess of 50 pounds. Claimant was permitted to bend and squat frequently, but only occasional crawling and climbing were permitted. Claimant was also restricted as to working around moving machinery and sitting for prolonged periods.

9. After leaving Dr. Ellison's office, Claimant hand-delivered the document with

1 Claimant analyzed her time cards to determine the amount of time she spent working in various positions upon her return to work.

permanent restrictions to Employer. By letter dated June 27, 2002, counsel for Claimant forwarded a copy of the document containing the permanent restrictions to counsel for Defendants.

10. During the remaining time Claimant worked in the pulp and paper area, she worked as either a rewind operator or a first helper. Both the rewind operator and first helper were less strenuous positions than second helper; nonetheless, they were physically taxing. Claimant testified that even as the first helper "the demands of the job are that I couldn't take it." April 2004 Tr., p. 53. In particular, Claimant testified that the job entailed moving large slabs of paper, and scraping down the extruded plastic from the dies. This latter task involved "squatting down on your knees and you have this little metal like a paint scraper and you are going down the length of the hot extruded poly . . .Anyway, you have to get underneath it, and they have about, I don't know, three feet, two feet of room to get under there, so you are scrunched up like a ball." *Id.* at 54.

11. Claimant's testimony that the lifting and carrying requirements of the second helper, rewind operator and first helper positions exceeded the restrictions placed on her by Dr. Ellison is unrefuted. It is undisputed that Employer made no attempt to modify any of the three positions to accommodate Claimant's restrictions. Sharon Vahlkamp, human resource representative for Employer, testified that she supervises the hourly payroll and benefits department. Her duties include being "part of the early return to work program, trying to get our employees back to work safely. . . ." *Id.* at 99. When asked whether she was "aware once [Claimant] was released to work of any restrictions that were placed upon her in the performance of her work," Ms. Vahlkamp responded "No." *Id.* at 103. Ms. Vahlkamp also testified that she was neither familiar with the job site evaluation (JSE) for the position of second helper, or the other positions Claimant performed in the pulp and paper operations, nor had she ever actually seen Claimant perform the second helper or winder operator positions. Ms. Vahlkamp further testified that she "did not see anything" from Dr.

Ellison subsequent to the December 2001 release. *Id.* at 106.

12. In February 2003, Claimant availed herself of an opportunity to move to a utility pool position in CPD that she believed would allow her to work within her restrictions. The change in position from the pulp and paper area to the utility pool in CPD resulted in a reduction of pay. Claimant testified that she took the position because of her back. "I'm not going to have [back] surgery, and I'm going to do everything in my power to not have surgery. And working a less strenuous job is the answer." *Id.* at 49.

13. Claimant testified that the move to CPD entailed an approximately $3.00 per hour wage reduction. Ms. Vahlkamp testified that at the time of her transfer to CPD, Claimant held the permanent position of 72" winder operator, that her rate of pay in that position was $16.49 per hour, and the rate of pay at CPD for the utility pool at that time was $15.125 per hour. The $15.125 per hour rate for the utility pool position in CPD is well documented in the record. *See* Supplement to Claimant's Ex. 22, Bates pp. 2 and 20. However, the $16.49 per hour that Ms. Vahlkamp stated was Claimant's pay rate as a permanent winder operator is not supported by the record. According to Employer's personnel records, Claimant's pay as second helper on the date of her injury was $17.39 per hour. When Claimant was permanently promoted to winder operator in the fall of 2002 her rate of pay was $18.20 per hour. *Id.* at Bates p. 4. The record contains nothing to indicate that following her promotion to winder operator Claimant's base pay changed in any way until she transferred to CPD.

14. Ms. Vahlkamp testified that in January 2003, a new contract resulted in a 3% across the board pay cut for Employer's workers. This across the board reduction was reflected in the pay rate for the CPD utility pool. A 3 % reduction of Claimant's $18.20 per hour rate as winder operator would have resulted in an hourly rate of $17.654.

15. Claimant testified that her ability to compete in the labor market had been reduced as a result of her restrictions. She could not return to her time of injury position as a second helper as it exceeded her lifting and carrying restrictions. She could not work in either the winder operator or first helper positions (more highly paid, less physically demanding positions) because they, too, exceeded her lifting and carrying restrictions. She could not return to former employer Horizon Air because of their 70-pound lifting requirement. She could not return to her clerical shipping job with former employer Three B's Moving and Storage because it required sitting at a computer terminal for extended periods of time.

16. Defendants retained Ivar W. Birkeland, Jr., M.D., to conduct an independent medical evaluation (IME) of Claimant. Dr. Birkeland is a board certified orthopedic surgeon. He practiced in Seattle, Washington, from 1967 until his retirement in 1997. He stopped practicing surgery in 1992. Since 1997, Dr. Birkeland has limited his practice to performing IMEs, primarily for sureties.

17. In his report, Dr. Birkeland opined that Claimant had reached maximum medical improvement (MMI), and he gave her a 5% whole person impairment rating. He further opined: "She needs no permanent restrictions. She can do her present job at the pulp mill on a full-time basis, with no limitations or restrictions." Deposition of Dr. Birkeland, Exhibit 1, p. 8.

18. Robert C. Colburn, M.D., was retained by Claimant to conduct an IME, which he did on February 26, 2004. Dr. Colburn, an orthopedic surgeon, has practiced in the Lewiston area since 1955 and was a founding partner of Lewiston Orthopedic Associates. At the time of his deposition, he had relinquished his owner/manager duties and was an employee of that group. Dr. Colburn testified that he performed IMEs for both claimants and defendants on an almost equal basis. Dr. Colburn agreed with Dr. Birkeland that Claimant was at MMI. The two doctors were also in agreement that Claimant's condition "is best represented as a DRE lumbar category II." Dr. Colburn

Deposition, Exhibit 32, Bates p. 08004. However, Dr. Colburn thought that a "6 % whole person impairment is warranted based on the reduced amplitude of the Achilles reflex on the right which I consider as a residual of the now resolved radiculopathy." *Id.* Dr. Colburn also considered calculating Claimant's impairment based on the range of motion method considering Claimant's multi-level changes shown in her MRI. Using the range of motion method, Dr. Colburn came up with a 12% whole person impairment, which he apportioned 50% to pre-existing degenerative conditions and 50% to the industrial accident resulting in a 6% whole person impairment attributable to the accident.

19. Dr. Colburn filled out a form provided to him by Claimant's attorney (similar to the one provided Dr. Ellison). Dr. Colburn noted that without a functional capacity evaluation, it was difficult for him to determine Claimant's physical abilities or impose appropriate restrictions. Based on his discussions with Claimant and his experience, he nevertheless suggested lifting, carrying, and positional restrictions that were remarkably consistent with those of Dr. Ellison.

Medical Care

20. Claimant testified that she personally was owed $2.00 from Defendants in unpaid medical bills. She also testified that Defendants had denied, and therefore not paid, a physician's $82.00 bill for a February 2004 medical exam. Regence Blue Shield picked up $72.00 of the $82.00 billed by the physician.

21. On February 10, 2004, Defendants mailed to Claimant the following payments:

$6,695.02	(Regence Blue Shield subrogated amount)
6,806.25	(5% PPI)
616.48	(unreimbursed medical expenses of Claimant)
3,722.50	(back PTD)
8,019.00	(back TTD).

22. With the exception of the amounts set out in finding of fact 20, Defendants have

reimbursed Regence Blue Shield and Claimant for their expenditures in obtaining medical care for Claimant's compensable work injury.

23. Claimant is an especially credible witness, both in her demeanor and in her ability to communicate events and activities. Claimant is also a fine historian and thorough researcher. Her testimony regarding her research of company time cards to determine precisely how many days she worked in various positions after her accident was particularly persuasive.

Discussion and Further Findings

Permanent impairment

24. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Defendants' expert, Dr. Birkeland, gave Claimant a 5% whole person impairment rating as a result of the industrial accident. Claimant's expert, Dr. Colburn, gave Claimant a 6% whole person impairment. Both used Table 15-3 of *Guides to the Evaluation of Permanent Impairment, 5th Ed.,* p. 384 (*AMA Guides*). Both doctors placed Claimant in diagnosis related estimate (DRE) lumbar category II, which offers an impairment range from 5 to 8 % of the whole person. Dr. Colburn has

provided a cogent explanation to account for his 6% rating, i.e., the reduced reflex of the Achilles tendon on the right. Dr. Coburn also considered an alternative approach to evaluating Claimant's impairment, and reached a similar result. During Dr. Birkeland's deposition, it became evident that Dr. Birkeland may not have had all the relevant information when he performed his evaluation. He was unaware of the restrictions imposed by Dr. Ellison, and was clearly confused as to what job Claimant was doing at the time of his evaluation. Dr. Birkeland could offer no particular reason for his choice of the 5% rating. When asked whether he had "any explanation for that [1%] difference [in impairment rating with Dr. Colburn]," Dr. Birkeland replied, "No." *Id.* at 11. Moreover, when asked on cross-examination, as to why he chose 5% from the 5-8% provided on Table 15-3, Dr. Birkeland replied, "No particular reason." *Id.* at 2.

Here, the Referee finds the opinion of Dr. Colburn more persuasive and concludes that Claimant has a permanent partial impairment rating of 6% of the whole person.

Permanent disability

25. The definition of "disability" under the Idaho worker's compensation law is:

> . . . a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

> when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. Among the pertinent factors are the following: the nature of the physical disablement; the cumulative effect of

multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430. The case of *Baldner v. Bennett's, Inc.*, 103 Idaho, 458, 461, 649 P.2d 1214 (1982) is instructive on the relationship between impairment and disability. In *Baldner*, the Supreme Court wrote:

> A claimant's impairment evaluation or rating is one component or element to be considered by the Commission in determining a claimant's permanent, partial disability, I.C. § 72-425, and is not the exclusive factor determinative of the disability rating fixed by the Commission. I.C. § 72-427. A disability rating may exceed the claimant's impairment rating. (Citations omitted.)

In order to establish that she has sustained disability in excess of her impairment, Claimant must prove, by a preponderance of the evidence, that she has sustained a loss of earning capacity or a reduced ability to engage in gainful activity. *Ball v. Daw Forest Products Company,* 136 Idaho 155, 30 P.3d 933 (2001). "[T]he Workmen's [sic] Compensation law does not require any particular method of proof." *Baldner*, 103 Idaho at 461, 649 P.2d at 1217.

As discussed below, Claimant has proved by a preponderance of the evidence that she sustained a loss of earning capacity as a result of her industrial accident.

Work Restrictions

26. Defendants contend that the only restrictions placed on Claimant were self-imposed, arguing that neither Dr. Colburn nor Dr. Birkeland discussed permanent restrictions in their IME reports. This assertion is correct insofar as it goes, but it ignores the permanent restrictions that Dr. Ellison imposed on June 25, 2002. Dr. Ellison's restrictions were not challenged directly by Defendants, although they did try to get both IME physicians to second-guess Dr. Ellison during their depositions. Defendants have cited no legal authority to suggest that permanent restrictions

imposed by a treating physician inherently lack legitimacy. In this case, the treating physician is far more familiar with Claimant, her history, her work situation, and her reliability in reporting her symptoms than either of the IME physicians. At the end of the day, however, all three physicians reached similar conclusions. Dr. Birkeland stated, "Again, I would say because of her injury and the fact that she has a disc problem at L5-S1 she probably should stay away from lifting or carrying probably, you know, 50 to 75 pounds." Birkeland Deposition, p. 48. Dr. Colburn identified similar restrictions based in part on his experience with individuals who had similar injuries, and in part on Claimant's reportage. In fact, Dr. Colburn went to the heart of the matter when he opined that Claimant would "likely last longer" by being "in the lighter or sedentary category." Colburn Deposition, p. 33. Dr. Colburn was also quite firm in his opinion that if he were Claimant's treating physician, he would not advise her to return to her time of injury job.

Earning Capacity

27. The Referee is not persuaded that, as Defendants claim, Claimant's move to CPD was voluntary in the sense that she was not bound by any physical restrictions. Nor is the Referee convinced that Employer lacked knowledge of Claimant's restrictions. Employer knew, or should have known, of Claimant's restrictions. Indeed, on June 25, 2002, Claimant hand-delivered a letter to Employer listing her restrictions. On June 27, Claimant's attorney mailed a letter to Employer to which Dr. Ellison's restrictions were attached. Having considered the opinions of the various doctors, and the restrictions set forth by Dr. Ellison, it was reasonable for Claimant to move from the pulp and paper area to CPD. None of the jobs she performed in the pulp and paper area following her return to work in December 2001 was within her restrictions. Employer offered no accommodations, and in fact, never discussed Claimant's limitations with her. When her Employer demonstrated such disinterest, Claimant resorted to self-help and found a position with Employer

that she could perform within her restrictions. As a consequence of the move to CPD, Claimant sustained a wage loss in excess of 14%.

Access to Labor Market

28. Claimant cannot return to her time of injury job. She no longer has access to positions in the career ladder above her time of injury position. She cannot return to previous positions as an airline attendant or a shipping clerk. The restrictions imposed as a result of Claimant's work injury "affect [her] potential for future employment especially if [she] continues to work in labor-related positions." *Henry2003,* 2003 IIC 0552, 0562 (Sept. 12, 2003). *See also, Vance2004*, 2004 IIC 0360 (May 24, 2004).

29. In sum, considering Claimant's PPI rating of 6% of the whole person for her back injury, a loss of earning capacity of 14%, and her non-medical factors (including time-of-injury wage, age, past work experience, and diminished ability to compete in the labor market), the Referee finds Claimant's present and probable future ability to engage in gainful activity has been reduced. The Referee concludes Claimant is entitled to a PPD rating of 10% of the whole person inclusive of her PPI.

Medical Benefits

30. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was

reasonable. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989).

At the time of hearing, Defendants owed $84.00 in recently incurred medical expenses. Moreover, $733.76 in past medical expenses remained in dispute. This amount comprises the contractual discount that Regence Blue Shield imposed on its providers, i.e., the difference between the amount providers actually billed for medical services and the lesser amount that Regence Blue Shield paid the providers. Had Claimant's injury been accepted by Surety as a workers' compensation claim, Surety would have had to pay the full amount that the medical providers billed. Because Defendants denied the claim, and Claimant's private health insurance picked up most of the medical bills, the providers were paid only the Regence Blue Shield contractual rate, and Claimant was responsible for co-payments. When medical service providers enter into contracts with health insurance companies, they willingly accept reduced contract rate payments in return for other benefits. Doctors and hospitals do not have the same opportunity to bargain for a *quid pro quo* on workers' compensation claims. When Defendants refuse to reimburse medical providers for the difference between billing rates and contract rates, the providers suffer a loss for which they did not bargain and Surety enjoys a windfall that it did not earn. Claimant is entitled to $817.76 in medical reimbursement. Of that amount, $733.76 shall be remitted to the medical service providers who were not paid their full invoiced amounts. The sum of $72.00 shall be remitted to Regence Blue Shield as reimbursement of its share of the $82.00 medical bill incurred shortly before hearing. The sum of $2.00 shall be paid to Claimant. The record is not clear whether the remaining $8.00 was unpaid, a co-pay, or was a contractual reduction of the $82.00 medical bill. That sum shall be remitted to the appropriate party.

Attorney Fees

31. Attorney fees are not granted to a claimant as a matter of right under the Idaho

Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, *or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law,* or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. (Emphasis added.)

The decision that grounds exist for awarding a claimant attorney's fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

Here, Claimant is entitled to attorney fees on several of the litigated issues. First, Defendants unreasonably delayed payment of the medical and income benefits that had been ordered paid in the February 28, 2003 Order. These benefits were not paid until February 10, 2004, nearly a year after the Commission's first order. Next, no reasonable grounds were put forth for the nearly five-month delay in payment of the PPI rating provided by Dr. Birkeland. The Commission has previously determined that such undue delay, especially following a Commission order, is unreasonable. *Nadine2004*, 2004 IIC 0270 (Sept. 27, 2000), *Hoeffliger v. High Mountain Timber*, 2000 IIC 0802 (Sept. 15, 2000). Finally, Defendants' refusal to pay the medical providers the full amount they invoiced, keeping the Regence Blue Shield write-down as a windfall, was unreasonable. Defendants' unreasonable actions necessitated a second hearing, and entitle Claimant to an award of attorney fees on these issues.

Defendants were not unreasonable in disputing the additional 1% of PPI and the disability in excess of impairment, and no attorney fees are awarded on these issues.

32. Defendants are assessed interest on the unpaid benefits awarded in the Commission's February 28, 2002 Order. Idaho Code § 72-734 provides that once a decision has been entered by the Commission awarding compensation of any kind to a Claimant, such award:

> shall accrue and the employer shall become liable for, and shall pay, interest thereon from the date of such decision pursuant to the rates established and existing as of the date of such decision . . .".

The section goes on to state that the interest accrues on all compensation then due and payable and on all compensation that becomes due thereafter regardless of whether an appeal of the award is taken. The statutory interest rate, according to the Secretary of State's Office, was set at 8.750% on July 1, 2001 and was the rate in effect at the time the Commission decision was filed. Defendants shall pay Claimant interest at the rate of 8.750% on $12,357.98 (back TTDs, back TPD, unpaid medical expenses) from February 28 2002 through February 10, 2003. Defendants shall pay Claimant interest at the rate of 8.750% on the $6,806.25 PPI benefits from September 25, 2003 until February 10, 2003. Defendants shall pay Regence Blue Shield interest at the rate of 8.750% on the subrogated amount of $6,695.02 from February 28, 2002 until February 10, 2003. Finally, Defendants shall pay interest at the rate of 8.750% to the medical providers on the $733.76 that was withheld by Defendants from February 28, 2002 until paid.

CONCLUSIONS OF LAW

1. Claimant sustained a back injury caused by a work-related accident on February 9, 2001. She has incurred a whole person permanent partial impairment (PPI) rating of 6%. Defendants are to be credited with any amount previously paid.

2. Claimant is entitled to a PPD rating of 10% of the whole person inclusive of her

PPI.

3. Claimant remains entitled to "reasonable medical care" for her work-related injury as was set forth in the February 28, 2003 Order. This includes all recent and past due amounts.

4. Claimant is entitled to attorney fees for delayed payment of total temporary and temporary partial disability benefits, medical benefits, and her initial 5% impairment rating. Claimant is entitled to interest on the unreasonably delayed benefit payments as provided by Idaho Code § 72-734.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED This 9th day of November, 2004.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2004, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JOHN R TAIT
PO DRAWER E
LEWISTON ID 83501

SCOTT CHAPMAN
PO BOX 446
LEWISTON ID 83501-0446

db /s/_____